

No. 01744

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**IN THE COURT OF COMMON PLEAS  
OF PHILADELPHIA COUNTY**

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Samantha Melamed and The Philadelphia Inquirer,  
Appellants,

v.

Philadelphia Police Department,  
Appellee.

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On Appeal from a Final Judgment of the  
Office of Open Records  
AP 2020-1213

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**BRIEF OF ACLU-PA AS AMICUS CURIAE SUPPORTING  
APPELLANTS, REVERSAL, AND DISCLOSURE OF RECORDS**

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## INTERESTS OF THE AMICUS CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit nonpartisan organization of over 1.75 million members. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty and equality embodied in the United States Constitution and civil rights laws. The ACLU of Pennsylvania is one of its state affiliates.

The ACLU of Pennsylvania is a strong advocate for government transparency, relies on Pennsylvania’s Right-to-Know Law to obtain records necessary for its work, and has significant expertise in the practical application of the Right-to-Know Law in agencies across the Commonwealth.

## SUMMARY OF ARGUMENT

*Amicus Curiae* urges this Court reverse the Office of Open Records, and order the Police Department to turn over the officer dismissal records to Appellants. As Appellants have argued, the Right-to-Know Law prescribes that result. But *Amicus* underscores the urgency of transparency in this context; “[a]ccess to information regarding public police activity is

particularly important because it leads to citizen discourse on public issues, the highest rung of the hierarchy of First Amendment values." *Fields v. City of Phila.*, 862 F.3d 353, 359 (3d Cir. 2017) (internal quotations omitted) (collecting cases). Allowing media access to these dismissal records serves the public at a crucial time for informed conversations on policing.

Transparency of law enforcement dismissals serves two key purposes that *Amicus* brings to the attention of this Court. First, the ability of law enforcement to fulfill its investigatory and enforcement functions depends in part on public trust, and that trust has deteriorated. Transparency of dismissals can mitigate at least some of the distrust that citizens feel for law enforcement, and can help rebuild the relationship between communities and police. Second, transparency plays a vital role in our system of civics and governance. Communities, elected officials, and stakeholders can only debate, consider, and make informed decisions about budgeting and other local ordinances with full knowledge of exactly what the dollars spent on policing ultimately fund—no matter their perspective on the issue.

Finally, *Amicus* also observes that transparency of police dismissals plays a different role—and serves different interests—than discipline of

other public officials. Law enforcement officers have a unique societal position relative to our civil rights and liberties: they are the only public officials who have authority to interrogate, detain, and arrest community members, and the only government workers who carry weapons with which they can threaten or end someone's life. Unlike dismissals of other public workers, law enforcement dismissals—including the records sought in this litigation—implicate exactly those powers, and often follow violations of individual constitutional rights. Accordingly, this Court can order disclosure here without implicating the privacy rights of all public workers.

## ARGUMENT

### **I. Transparency of police dismissals promotes law enforcement accountability and can mitigate distrust between police and communities.**

Distrust between communities and law enforcement has substantially increased in recent years. This owes to numerous factors, including but not limited to increased availability of cell phone and body camera footage, high profile incidents of law enforcement officers killing unarmed civilians, and the increasing propensity of officers to live outside of the communities in which they serve. *See, e.g.,* President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing*, Office of Community Oriented Policing Services (May 2015);<sup>1</sup> *see also* Cynthia Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 159 (2019) (“Many people avoid calling the police, even when in danger, wanting to avoid future encounters, especially after high-profile police violence.”). But regardless of its origin,

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<sup>1</sup> Available at:

<https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/115/attachments/original/1570474092/President-Barack-Obama-Task-Force-on-21st-Century-Policing-Final-Report-min.pdf?1570474092>.

this distrust causes several problems for stakeholders across the criminal legal system. Among other effects, distrust inhibits law enforcement's ability to investigate and solve cases, heightens tension during ordinary interactions between community members and law enforcement, and generally undermines the ability of law enforcement to serve its ostensible function. *See* President's Task Force at 1 ("Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority.").

Dismissal transparency would contribute to efforts to rebuild trust between law enforcement and communities. *See* President's Task Force at 1 ("Law enforcement agencies should also establish a culture of transparency and accountability to build public trust and legitimacy."). To be sure, transparency alone cannot address a multi-faceted problem. But communities might have more reason to trust individual officers if police departments were open and honest about their officers who have been dismissed over prior and repetitive injurious conduct; communities might have more confidence in interactions with law enforcement generally if they



trust that misconduct during an interaction will come to light and result in consequences for the officer. See Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 802 (2016) (“when police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective”); see *Harms of Hiding*, 22 CUNY L. REV. at 158 (“The deflections, delays, and denials of responsibility for police violence cause more unrest and distrust.”). Dismissal transparency can also address one of the most pernicious double-standards that engenders suspicion and mistrust in the wake of law enforcement killings of community members—attempts in the immediate aftermath to portray victims as imperfect or flawed, without releasing any comparable information that exists about officers. See *Harms of Hiding*, 22 CUNY L. REV. at 154-56.<sup>2</sup>

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<sup>2</sup> “Following any violent encounter, the power of releasing a person’s history of violence is indisputable. The police know this; they often unlawfully and recklessly release the sealed arrest history of people police have killed. . . . As the police push their narrative of events, they almost never reveal an officer’s history of violence.”

Dismissal transparency also enhances the ability of people outside of the criminal legal system to help hold the system accountable. The public right to record police during the course of their work is vital, but it “complements the role of the news media” in reporting on policing and the criminal legal system. *Fields*, 862 F.3d at 359. Investigative journalism serves an especially important function because it can identify persistent problems that undermine efficacy and trust in the system, and spur work by all stakeholders to address them. *See Harms of Hiding*, 22 CUNY L. REV. at 159 (“many people do not engage with the governmental oversight systems because they cannot learn what penalty, if any, an officer receives”); *see also id.* at 166 (discussing officers not having ability to compare own discipline to other officers’ discipline to assess discrimination or proportion). If numerous officers have been dismissed for similar types of misconduct, law enforcement officials and outside advocates alike can identify systemic issues with officers adhering to policy, and come up with possible solutions. *See Citizens Police Data Project*, INVISIBLE INST., <https://perma.cc/HC4Z-JW3V>.

Indeed, the Government itself benefits from transparency of dismissals for exactly that reason. The Government does not have any interest in protecting civil rights violations, but it often takes transparency and recognition of patterns of misconduct to “spur[] action at all levels of government to address police misconduct and to protect civil rights.” *Fields*, 862 F.3d at 360 (internal quotations omitted). Transparency and public discourse, *see* section II, *supra*, related to police work actually “help them carry out their work.” *Id.* Transparency of dismissals also helps prevent future violations in other jurisdictions—cities and towns across the country often unwittingly hire officers with patterns of dishonesty, excessive force, or other serious misconduct, because their prior dismissals have never come to light. *See* William H. Freivogel and Paul Wagman, Wandering cops shuffle departments, abusing citizens, ASSOCIATED PRESS (Apr. 28, 2021) (noting that officers hired after prior dismissals “are subsequently fired and subjected to ‘moral character’ complaints at elevated rates relative to both officers hired as rookies and veterans with clean professional histories.”).<sup>3</sup>

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<sup>3</sup> Available at: <https://apnews.com/article/michael-brown-business-police-reform-death-of-george-floyd-bfd018e3c12413f840482efca29ca6ba>

The Government also benefits from transparency because it protects the finality of convictions. By spurring earlier correction of pervasive misconduct, the Government is far less likely to face after-the-fact invalidation of convictions on the basis of misconduct it could have stopped. See Tom Jackman, *As prosecutors take larger role in reversing wrongful convictions, Philadelphia DA exonerates 10 men wrongfully imprisoned for murder*, THE WASHINGTON POST (Nov. 12, 2019). “Cases involving corrupt officers have set off a string of exonerations in Philadelphia. After longtime homicide detective Philip Nordo was accused of intimidating and sexually assaulting witnesses, defense attorneys began revisiting Nordo’s cases and sending them to the Conviction Integrity Unit. Three murder convictions worked by Nordo have now been vacated, and Nordo is in jail on sexual assault charges.” *Id.* Correcting pervasive issues earlier both helps ensure that innocent people do not go to prison, and that the Government can defend valid convictions later.

## **II. Communities and elected officials can only make informed policy and budget decisions with knowledge of law enforcement dismissals.**

Beyond promoting trust and accountability that can improve the efficacy of policing and the criminal legal system, dismissal transparency also has a vital role to play in our civic life and in our government. Robust civic deliberation about budgets and spending priorities relies on all stakeholders having informed perspectives on what public money funds. Elected officials and the people who vote for them need information about systemic misconduct, policy violations, and civil rights abuses because those abuses impact the public fisc—transparency helps the public understand what its money funds, including whether that money has been spent well under the circumstances. Dismissal transparency could help the government make more informed decisions about public money, protecting taxpayers and ensuring that it uses public funds responsibly.

Elected officials and voters must make difficult decisions about budgeting public money all the time. Communities and elected leaders deliberate carefully over those decisions and often have more things they would like to fund than money to pay for them. Cost pressures force

deliberators to assess the efficacy of existing or proposed programs in reference to statistics and data, and to make decisions accordingly. Many publicly-funded programs have enormous quantities of government-disclosed data to help inform those deliberations—K-12 education, for example, has many statistics that advocates use to discuss education budgeting. *See, e.g.,* The School District of Philadelphia, Philadelphia Public Schools Data for District, Charter, Alternative, and Other/Cyber Students and Schools, *available at:* <https://schoolprofiles.philasd.org/>. Policing, which takes up increasingly large shares of city budgets—including in Philadelphia—must not shield entire categories of information about how public money is being spent from citizens and elected officials.

What data does exist suggests that the sorts of law enforcement activity that give rise to dismissal end up costing cities like Philadelphia huge sums of money in civil rights lawsuits. But that information can be hard to come by, difficult to aggregate, and necessarily under-counts the scope of misconduct—often it only even comes out because of the dogged efforts of investigative journalists to collect and contextualize it. *See* The Force Report, NJ.COM: PROJECTS & INVESTIGATIONS, *available at:*

<https://perma.cc/U99S-A2MC> (describing difficulty of assembling information on officer use of force, and contextualizing settlements or verdicts based on widely varying factors separate from the misconduct itself.). Stories like this exist in no small part because of open public records laws, and reporters' pursuit of records through them.

The amount of money that cities like Philadelphia spend on lawsuits following misconduct that violates a person's civil rights undoubtedly bears on public discourse. Transparency might highlight both the cause and effect of misconduct on public budgets, and the shortcomings of relying on civil settlements or verdicts to track and deter misconduct in the first place. Robust investigative journalism, for example, can reveal repeated discipline for false statements during internal investigations that eviscerate accountability in any forum or context after the fact. See Jan Ransom, *In N.Y.C. Jail System, Guards Often Lie About Excessive Force*, THE N.Y. TIMES, Apr. 24, 2021 (quoting a city councilman saying that discipline data "highlights

how broken this process is and a need to make real efforts to reform it.”);<sup>4</sup> *see also Harms of Hiding*, 22 CUNY L. REV. at 154 (discussing lack of transparency as depriving victims of law enforcement violence of key information in seeking redress).

To be clear: transparency of dismissals would not put a thumb on the scale in debates about police funding and public money. Transparency contributes to a more robust discourse about police funding overall, regardless of one’s normative position. *See Fields*, 862 F.3d at 358 (observing that the “increase in the observation, recording, and sharing of police activity has contributed greatly to our national discussion of proper policing”). For people who might argue for defunding police budgets or reallocating that money to other uses, statistics about dismissals could bolster an argument that the City pays too much money for ineffective enforcement that causes rampant civil rights violations. *See Kendra Brooks*, Philadelphia Police Aren’t Solving Crimes. It’s Time To Divert Their Funding, *The Appeal* (Apr.

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<sup>4</sup> Available at: <https://www.nytimes.com/2021/04/24/nyregion/rikers-guards-lie-nyc-jails.html>.



15, 2021) (observing that the police budget increased by \$115M over five years while police only even arrested alleged assailants in 20% of all shootings).<sup>5</sup> For others, statistics about police misconduct could provide important context to argue that certain kinds of pervasive misconduct signal a need to allocate new or more funds for training programs, less lethal weapons, or other interventions that might address common issues. *See* Matt Petrillo, Philadelphia Mayor Kenney’s Budget Proposal Includes \$35.5 Million Spending For Anti-Crime Measures, Police Reforms, CBS PHILLY (Apr. 15, 2021) (describing Mayor’s proposal to add \$1.3M in funding for training and behavioral tracking of officers). Transparency enhances the conversation and increases the likelihood that cities and governments ultimately make decisions from an informed posture.

All told, dismissal transparency would provide vital information to stakeholders on all sides of civic discourse around law enforcement. A more robust community conversation informed by actual data about law

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<sup>5</sup> *Available at:* <https://theappeal.org/philadelphia-police-arent-solving-crimes-its-time-to-divert-their-funding/>.

enforcement misconduct could achieve better outcomes in making budgetary decisions, directing money toward programs that work, and generally using public money and power to serve the interests of the people and limit civil rights violations. In the absence of transparency, those same conversations take place—but among people whose best intentions cannot make up for the information void they face.

### **III. Police are uniquely positioned relative to other government employees, which heightens the stakes for transparency of dismissals.**

*Amicus* regularly takes positions protective of individual privacy and does not urge public disclosure in employment contexts lightly. But police have two key distinguishing features even from other public employees that heighten the stakes for transparency here. First, law enforcement officers are the only public officials who have the power to interrogate, detain, and arrest people, and to carry weapons with which they may threaten or take their lives. Second, law enforcement dismissals often stem from situations in which someone's civil rights have been violated through physical harm, unlike other public officials, whose discipline stems from underlying actions with lower stakes. Not only do these distinctions cut in favor of transparency

here, but they should also assuage any potential concern that a ruling here would open the floodgates to invasions of privacy.

First, transparency of police dismissals in particular has unique importance because of the power officers wield. Officers have the power to restrict people's physical liberty by providing information for authorized warrants, by stopping people in public, and by arresting people even without warrants under some circumstances. *See Harms of Hiding*, 22 CUNY L. REV. at 153. Even arrests that ultimately do not lead to charges substantially restrict a person's liberty by resulting in booking and detention, and can have enormous effects on that person's life, including employment, housing, and family unity. People detained for even a few days may lose employment, their homes, and access to their children *See, e.g.,* Hayden Mitman, *Philadelphia is Looking to Skip Bail*, Philly Voice (Aug. 12, 2016), <https://www.phillyvoice.com/could-philadelphia-prisons-do-away-bail/>. Officers also have the authority to use deadly force against people they encounter in public, up to and including taking someone's life, and may invoke this authority to justify unlawful actions. *See* Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding*

*Officer Misconduct*, 28 STAN. L. & POL. REV. 109, 142 (2017) (“police officers have the unique state-sanctioned ability to use force on other citizens”); *see also Harms of Hiding*, 22 CUNY L. REV. at 153. No other public officials have such power.

Second, transparency of police dismissals differs from discipline of other public workers because police dismissals often relate to violations of individual constitutional rights and liberties. Law enforcement officers are often dismissed for egregious conduct that also gives rise to civil liability, including but not limited to uses of force or restrictions of liberty that violate both department policy and constitutional rights. Especially where dismissal directly relates to those subjects, it should be public. *See Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989) (allowing access to discipline records because the “documents related simply to the officers’ work as police officers.”). Virtually no other public worker dismissal records implicate the same public interests, because virtually no other public workers have those powers. *See Seth Stoughton, The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2182 (2014) (describing unique role of police as reason to consider context in applying otherwise neutral regulations). And even

where law enforcement dismissals do not cover the exact circumstances, the dismissal still implicates an individual officer's judgment and practices that the officer would also bring to bear in other situations involving the use of force. Again, no other public worker discipline is similar in that regard. Accordingly, this Court need not worry that a decision here will undermine privacy rights for workers with less power and authority—especially where police authority that depends on public trust has been degraded over time in part because of mistrust engendered by lack of transparency.

### CONCLUSION

Appellants should access the records in this case because the Right-to-Know Law prescribes that result. But context here confirms why that result matters. Transparency of police dismissals can enhance law enforcement's ability to fulfill its mission by rebuilding trust with the public, and it can inform all sides of public discourse about policing, budgeting, and other vital issues. The judgment of the Open Records Office should be reversed, and the records should be disclosed to the Plaintiff-Appellants.

Respectfully submitted,

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May 3, 2021

### **CERTIFICATE OF SERVICE**

I certify that on May 3, 2021 this brief was filed using the Philadelphia Court's Electronic Filing System. All participants in the case are registered users and will be served electronically via that system.

### **CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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